IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

HENRY LOCKHART,
Appellant,
vs.
H. C. LEEDS, J. A. JOHNSON, JULIA JOHNSON, ET AL.,
Appellees.
No. 121.

STATEMENT AND BRIEF FOR APPELLEES.

There was filed in this cause an original bill of complaint and an amended bill. To both of these, demurrers were sustained. A second amended bill of complaint was then filed, and to this a demurrer was also sustained, and it is from the action of the Court in sustaining the demurrer to this second amended bill of

complaint that the appeal to the Supreme Court of the Territory was taken; and from the decree of the Supreme Court of the Territory affirming the decree of the District Court, this appeal is taken.

All of the record in this cause preceding folio 56, page 33 is immaterial. The second amended bill of complaint begins on page 34. On page 45 in the record appears a motion to dismiss this second amended bill of complaint from the files, because it was not filed within the time allowed by the Court for pleading further upon sustaining the demurrer to the first amended bill of complaint and was filed without leave of the Court. It seems that the court did not pass upon this motion, but allowed the plaintiff to refile his second amended bill of complaint, and ruled the defendants to plead to the same. In answer to this rule, the defendants filed a demurrer, Record page 47. The intervening petition of Joel Parker Whitney and the motion for consolidation of this cause, No. 3888, with two other causes between the same parties, Record pages 49 to 59, are wholly immaterial on this appeal, and uselessly encumber the record. On page 60 appears the final decree sustaining the demurrer and dismissing the case, from which the appeal was taken.

The statement of the material allegations in the complaint and demurrer by the Supreme Court of the Territory is so complete that little can be added to it, and we follow it closely. Record page 64, 10 New Mexico, 568. And whenever we have added to it, we have used brackets. The bill alleges that the plaintiff

and Johnson (then and there) delivered the articles and provisions mentioned in the contract and paid the money and divers other sums of money to and for the said Pilkey. And in all respects kept and performed the said agreement upon their part. (*It no where alleges that any of these articles or any of this money paid was for, or was used in and upon or about the mining claim in dispute in this cause.*) It further al leges that under this agreement, Pilkey located a claim in the name of himself, the appellant, and Johnson, on July 10th, 1893, called it the "Sampson," and that a copy of the location notice is filed as "Exhibit B" to the bill; that he posted that location notice on the said claim marked the boundaries on the ground, transmitted at the request of appellant and Johnson samples of the ore and sunk a shaft or cut on said claim to the depth of ten feet, showing mineral in place within less than ninety days from the time of taking possession of said lode. It further alleges that the discoveries and locators of said claim, not then knowing whether the said mineral was situated upon the public domain of the United States, and so free and open to location under the mining laws of the United States, performed the required acts of location under the said laws and the laws of the Territory and was ready, able and willing in all things to comply therewith, and would have done so except for the fraudulent and unlawful acts of the defendants therein menltioned. The bill alleged the performance of every necessary act to constitute a valid location notice. (The bill also alleges, folio 66.)

"Your orator further states that after the removal by the said defendants of the said location notice posted as aforesaid, by the said Pilkey on the said 'Sampson' mine, a copy thereof was procured by your orator, of which 'Exhibit C' filed herewith is a copy, and the same was recorded in the office of the recorder of said county on December 9th, 1893, etc." There is no allegation to show how the alleged fraudulent acts of the defendants prevented the procuring and recording of the said notice prior to the tenth day of October, A. D. 1893, within ninety days from the date on which it is alleged said claim was located, as required by the Statute of New Mexico. Nor does it allege when and where the plaintiff procured the copy which he caused to be recorded. The only way the plaintiff could have been prevented from procuring a copy would have been for the defendants to have taken possession of the mine before October 10th and thereby removed and withheld from the plaintiff the copy of the location notice posted on the claim; he, the plaintiff, not having previously obtained a copy thereof. *The bill does not allege when possession was taken by the defendant, whether before or after October 10th.* It does allege that on or about October 1st, while in possession of the claim. Pilkey conspiring to defraud and, "on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, an agreement was made," the agreement above referred to. An examination of the allegations of the bill would show inferentially that possession was taken by defendants before Octo-

ber 10th. The contract between Pilkey and plaintiff and Johnson did not make it Pilkey's duty to record the notice, unless the words "prospect and locate" imply it. Plaintiff and Johnson had the right to abandon or keep the claims he might locate. He was to send them ore from the claims. There is no allegation that they never requested him to do anything else.)

It further alleges, that on or about October 1st, 1893, the defendant Pilkey, while so in possession of the said lode, ledge, or lead, under and in pursuance of said agreement, wrongfully and fraudulently conspired with the defendants Leeds, J. A. Johnson, Fagaley and Walker, to defraud the appellant and the said Johnson of their interest in and title to the said mines and minerals, discovered and possessed by them as aforesaid, of which the said Pilkey, as the partner and co-owner with your orator, was then in pursuance of said conspiracy and confederation in possession, and on, to-wit, October 1st, 1893, the precise date whereof being unknown to your orator, an agreement was made and entered into by the defendants Fagaley, J. A. Johnson, Walker and Leeds, and the defendant Pilkey, by which it was agreed that the said Pilkey in violation and fraud, of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement should transfer, convey and deliver possession of said mine to the last named defendant without the knowledge or consent of your orator and the said Johnson, and that they should do and perform all other acts

deemed necessary for that purpose. And the bill further states, "That the said complainant (meaning Pilkey) by an instrument in writing, the precise terms of which are unknown to complainant and same being in possession of defendants or some of them, sold, transferred and conveyed to the defendants Fagaley, J. A. Johnson, Leeds and Walker an undivided four-fifths interest in said mine and mineral, the said Pilkey retaining an undivided one-fifth interest therein, which was conveyed to said Walker by said instrument and by him held in secret trust for said Pilkey, and in pursuance of said fraudulent combination and conspiracy, the defendants Frank Fagaley, J. A. Johnson, Lee Walker and H. C. Leeds, together with the defendant J. Q. Wills, caused and procured the defendant Pilkey to stop work upon the said mines under his said agreement and to fail and neglect to record the said location notice so by him posted thereon as aforesaid, and the said defendants, or some of them, wrongfully removed the said location notice from said claim and said defendants covered up or concealed the said workings thereon, theretofore done and performed by the defendant Pilkey, and without the knowledge or consent of your orator and the said Johnson, entered into and upon said lead, lode, ledge and deposit bearing gold and silver, and upon the said parcel or surface ground, including the same mentioned and described in said location notice, and known as the 'Sampson' mine, and denied and still deny that your orator had or has any interest therein, and thereafter, having so

procured possession of the same, the said defendants in pursuance of said confederacy, caused to be posted upon said mine a location notice, and filed the same for record in the recorder's office of said county," etc., a copy of which is filed and a part of the bill, etc., and, "thereby said defendants claimed to have located the said lode for the benefit of themselves as locators * * * under the mining laws of the United States, and called and designated the same as the 'Washington lode.'" The bill then alleges that the said defendants agreed among themselves as to the respective interests each of them should have in said location, and that the said Pilkey should be entitled to a one-fifth interest therein, but that the said last named interest should be claimed and held by said Walker in trust for him.

The bill then alleges that the ground upon which these locations were made is situated within the exterior boundaries of a tract of land claimed to have been granted in 1728, by the then Spanish authorities, to one Antonio Lucero, and that the same was, at the time of the making of said locations, claimed by certain persons under said alleged grant, and that claims were then, and at the time of the filing of said amended bill, pending in the United Staes Court of Private Land Claims, and undetermined; and further alleges that neither the said Antonio Lucero, nor his heirs or successors, had become entitled in law or equity to the minerals contained therein, and that by virtue of the

location of the said "Sampson" claim by the said Pilkey, under the said agreement with the appellant, the appellant became and now is equitably entitled to the minerals contained therein, and had a paramount right and title in and to the same, as against the said defendants of any or either of them. It also alleges that the other defendants named in the bill claim some right or interest in and to said mining claim known as the 'Washington," derived through their co-defendants. It alleges that the mineral deposit so discovered by said Pilkey was not and is not subject to location as a mining claim under and in pursuance of the laws of the United States, because the same is situate within the said alleged private land grant, and that by virtue of the said prior discovery, possession and working of the said mining claim by the said Pilkey under said agreement, the appellant became and was and is equitably entitled to the minerals contained in said location as against the said defendants, or any other persons, except the Government of the United States The bill also alleges that the appellant by virtue of conveyaneces, had acquired an undivided title and interest as tenant in common in said private land claim superior to any title or right thereto on the part of the defendants, or either of them, and is lawfully entitled to enter upon and work the said mine.

The bill also alleges, that after the removal by the said defendants of the said location notice, posted as aforesaid by Pilkey, a copy thereof was procured by the appellant and filed and recorded in the office of

the recorder of the county of Bernalillo in which the same was situate.

The bill further alleges, that the appellant, by virtue of the facts alleged in the said bill, became the equitable owner of the mineral in said claim, and had a preferential right to acquire the legal title to the same from the United States, and that the location thereof under the name of the Washington by the defendants was wholly inoperative and void, and that the said Pilkey, by reason of his participation in the said fraudulent conspiracy and combination by virtue of the said agreement with the appellant and Ben Johnson, had forfeited all right or interest, direct or indirect, in and to the said Sampson mine, and that said defendants claimed that the said Washington location was a valid location and denied the appellant had any interest therein, and excluded him from the possession thereof The bill also alleges the insolvency of some of the defendants, and that the appellant would suffer irreparable injury unless the defendants were enjoined from working the same.

The bill then prays for the appointment of a receiver to take possession of the said Sampson mine, and that the said transfer and conveyance executed by the said Pilkey to said Fagaley, Leeds, J. A. Johnson and Walker be declared fraudulent and void as against him, and that it be cancelled and annulled; and that the location notice of the Washington lode be decreed to be void and of no effect as against the appellant; and that the defendants be enjoined from mining,

working or removing from the said Washington lode any ore; and that he be decreed the equitable owner of the said ore and mineral contained therein; and also for general relief.

To this bill the defendants filed a demurrer, among others, upon the following grounds: That the bill did not allege that the defendants entered upon the mining claim within three months after the said mining claim is alleged to have been located under the name of the "Sampson"; that it appears that no valid location notice was ever posted upon the surface of said claim or recorded in the recorder's office, as required by law; and because the agreement alleged to have been made between plaintiff and Ben Johnson and defendent Pilkey was subject to revocation by either party thereto at any time; and that the facts alleged in the amended bill amounted to an abandonment of said alleged "Sampson" claim under the terms of his alleged agreement and because it did not appear from the allegations in the bill, that at the time of the alleged entry of the defendants on this exact mining claim, the complainant and his co-locators, were in possession of the said mining claim or any part thereof; and because the complainant's remedy was at law, and that the amended bill did not state a case for a court of equity.

The assignments of error by the appellant are, that the court erred in sustaining the demurrer of the defendants to the plaintiff's "second" amended complaint, and ordering the dismissal of the said case.

POINTS AND AUTHORITIES.

I.

We have already shown that the bill does not allege that possession was taken before the ninety days allowed for perfecting a location had elapsed. Inferentially it alleges that possession was taken before. It should have clearly alleged when it was taken "It may be affirmed as an elementary rule of the most extensive influence that the bill should state the right title or claim of the plaintiff with accuracy and clearness, and that it should, in like manner, state the injury or grievance of which he complains, and the relief which he asks of the Court."

Story on Equity Plead., Sec. 241.

"Uncertainty in a bill (as has been well observed) may arise in various ways. (1.) The case intended to be made by the bill may be vague and uncertain (2.) The case intended to be made may be certain, but the allegations of the bill may be so vague and general as to draw with them the consequences and mischiefs of uncertainty in pleadings. (3.) Some of the material facts may be stated with sufficient certainty, and others again with so much indistinctness or incompleteness as to their nature, extent date, or other essential requisites (as, for example, in stating the title of the plaintiff) as to render inert, or inefficient, those with which they are connected,

or upon which they depend. In each of these cases the defect may be fatal to the objects of the bill."

Id. 242.

We respectfully submit that this bill was filed upon a theory of the law of mining claims within unconfirmed grants, which this Court has held unsound, and the allegations have never been amended, as will be shown by a comparison with the original bill. The failure to allege when possession was taken is vital. It is upon the theory that it was taken after October 10th, that appellant attempts to build up his case. There is no allegaion in the bill to support it. The pleading, if ambiguous, is taken most strongly against the pleader. The allegations of fraud, or how plaintiff was injured by Pilkey's failure to record the location notice, or why he did not record it himself prior to October 10th, since he did record in December, are equally fatal. Out of the many instances of fatal defects for uncertainty cited by Story, in the sections following those we have quoted from, we quote the following:

"So, where a bill was founded upon the supposed due execution of a power, and insisted, in the alternative, that it was a good execution of the power at law, or if not, that it was a good execution of the power in equity; the bill was held bad on demurrer; for the plaintiffs ought to state distinctly whether their case is at law or in equity; for if it be good at law there may be no remedy in equity."

Story on Equity Plead., Sec. 246.

The facts which determine whether the remedy is at law or equity are not distinctly alleged.

"A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms; nor the correctness of the ascription of a purpose to the parties when not justified by the language used."

Dillon vs. Barnard, 21 Wallace, 437.

The recovery must be had on the case made by the pleadings or not at all.

Grosholz vs. Newman, 21 Wall., 488.

Further, on the question of certainty of allegation when possession was taken, and of fraudluent withholding of the location record, we quote: "There must be a sufficient equity apparent on the face of the bill to warrant the relief prayed for, and the material facts on which the plaintiff relies must be so distinctly alleged as to put them in issue."

Harding vs. Handy, 11 Wheat., 103.

See also,

Harrison vs. Nixon, 9 Peters, 483.

"No decree can be founded on matters not in issue between the parties. If the bill sets up a case of fraud, the complainant is not entitled to relief by establishing some one or more of the facts independent of fraud, although the facts might create a case un-

der a wholly distinct head in equity."

Bradley vs. Converse, 4 Cliff, 366.

"The rule is familiar that the Court will refuse to decree unless the substantial ground work of the case on which relief is sought is *distinctly* alleged in the bill."

The case holds that the objection is by demurrer

Pelham vs. Edelmeyer, 15 Fed., 262.

See also,

Foster vs. Goddard, 1 Black., 506.

Socola vs. Grant, 15 Fed. Rep., 487.

Eyre vs. Potter, 15 How., 42.

Kohler vs. Hubbey, 2 Black, 715.

"It is not permissible for a complainant to unite in his bill two inconsistent causes for equitable relief An action to set aside a transfer as fraudulent, in which the Court is asked to adjudge the defendant's title to the vessel void, and one where the transfer is alleged to be valid and the complainant claims relief on the theory of a subsisting joint interest with the defendant by reason of the transfer, proceed on entirely different grounds, and are utterly repugnant to each other. Both theories cannot be true on any hypothesis of fact, or by any fiction of law."

Wilkinson vs. Dobbie, 12 Blatch., 298; 29 Fed. Cases, No. 17,670.

This is exactly in point. Plaintiff has proceeded upon the theory that the locations were both made when no legal locations could be made, that plaintiff's possession was intruded upon by collusion, and

agreement prior to the 10th of October, 1893, and that his rights being equitable he had a right to maintain this suit. The Court held that on this state of facts, if true, his prior possession would sustain an action at law. That the relief he asked was not equitable. The specific relief he asked was that the Washington location be declared void and for possession. Now he maintains that the location of the Washington be held void, and that the holders of the title be held as constructive trustees under the prayer for general relief. We respectfully submit that the allegations in the bill for this purpose are absolutely uncertain and do not warrant any such relief. That under the authorities quoted in appellants' brief the Washington location must be held valid, and that he has not even attempted to state or stated a case, which would entitle him to reach the alleged interest of Pilkey in the Washington. As to what particularity is necessary in allegations of fraud, see

U. S. vs. Atherton, 102 U. S., 372.
Ambler vs. Choteau, 107 U. S., 589.
Voorhees vs. Bowstick and wife, 16 Wall. 16.

"Whether the fraud be alleged in the declaration complaint or bill, or set up by way of defense in the plea, answer or replication, it is essential that the facts and circumstances, which constitute it, should be set out clearly, concisely and with sufficient particularity to apprise the opposite party of what he is called upon to answer."

9 Ency. of Plead. & Prac., 687, and many authorities cited.

"Charging, generally, that what was done was 'colorable,' a 'fraud,' a 'breach of trust' and a 'scheme, these are allegations of legal conclusion merely which a demurrer does not admit."

Fogg vs. Blair, 139 U. S., 127.

See also,

St. Louis Ry. Co. vs. Johnston, 127 U. S. 577.

"Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient ground of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud, or a breach of trust, for which a Court of Chancery can give relief."

Van Weel vs. Winston, 115 U. S., 237.

See also,

Brooks vs. O'Hara, 7 Fed. Rep., 532.

Phelps vs. Elliot, 35 Fed. Rep., 455.

"Manifestly, in equity pleadings, general accusations of fraud and collusion are ineffective. 1 Daniell, Ch. Pr. (5th Ed.) 324, and notes; Riley vs Lyons, 11 Heisk, 251; Whitthorne vs. St. Louis M I. Co., 3 Tenn. Ch., 147. The pleader should state the facts and not formulate mere epithetic 'charges.' And it has been recently decided that the same rule applies at law. Hazard vs. Griswold, 21 Fed. Rep. 178. If the facts are not t obe ascertained by dili-

gence, because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity for discovery, where that is wanted; but a Court cannot sutain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrongdoing appears, without much necessity for characterizing it as such."

Lafayette Co. vs. Neely, 21 Fed. Rep., 744

The only allegation of fact in the bill, is that Pilkey gave up an undivided third interest standing in his own name in the "Sampson" and accepted an undivided fifth in the "Washington," as an inducement to withhold from record the "Sampson" location, and to surrender possession to the locators of the "Washington," but when this was done is left without allegation, inferentially before the 10th of October. We submit that there are n oallegations in the bill justifying the Court in granting the relief specifically prayed for in the bill, and that the demurrer was properly sustained.

The first ground of demurrer quoted in appellant's brief, is based upon the proposition that the land was subject to entry under the mining laws, and if the Washington location was made after the ninety days had elapsed, it was a valid location and could not be declared void as prayed for in the bill, and

this is true. If possession was taken before the niety days had elapsed, that possession was unlawful, and the remedy is in law. We will further consider these propositions hereafter.

II.

The plaintiff is now contending that the defendants can be held as constructive trustees. The bill was filed for no such purposes, and there are no allegations in the bill on which such relief can be predicated under the authorities already cited.

UNDER THE PRAYER FOR GENERAL RELIEF, ONLY SUCH RELIEF AS IS AGREEABLE TO THE CASE MADE BY THE BIL' CAN BE GRANTED.

English vs. Foxall, 2 Peters, 612.

Hobson vs. McArthur's Heirs, 16 Peters 182.

Boon vs. Chiles, 10 Peters, 177.

"Now, it is perfectly clear, according to the practice of the Court, where a specific relief is prayed for even though there be a prayer for general relief, the Court cannot grant a relief which is inconsistent with or entirely different from that which is asked for."

Wilson vs. Graham, 4 Wash. C. C., 53; 30 Fed. Cases, No. 17,804.

"It is true that there was a prayer for general relief, but relief given under the general prayer must be agreeable to the case made by the bill."

Allen vs. Pullman Palace Car Co., 139 U. S 6662.

Hayward vs. National Bank, and authorities cited, 96 U. S., 614.

Georgia vs. Stanton, 6 Wall., 77.

"In order to entitle a plaintiff to a decree under the general prayer, different from that specifically prayed, the allegations relied upon must not only be such as afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed, otherwise the Court would take the defendant by surprise, which is contrary to its principles."

I Daniels Ch. Pr., 386. Quoted and applied in Curry vs. Lloyd, 22 Fed. Rep., 264, which see specially.

"But, even when a prayer of general relief is sufficient, the special relief prayed at the bar must essentially depend upon the proper frame and structure of the bill; for the Court will grant such relief only as the case stated will justify; and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby."

Story Eq. Plead., Sec. 42.

See also,

3 Ency. of Pl. & Pr., 350, et seq., and notes

In view of these authorities the conclusion seems inevitable that the frame and structure of this bill was not intended to secure the holding of anybody

as constructive trustee under the "Washington" location. It did seek to forfeit Pilkey's interest in the "Sampson." The relief now sought is wholly inconsistent and in conflict with that for which the bill was framed and the prayers for the specific relief.

This Court in the opinion rendered in favor of the defendants in the ejectment case, made a reservation as to any equitable right the plaintiff might show, to hold the defendants as constructive trustees on the ground of fraud, but this suit when that decision was rendered, had already been tried. This bill was not filed for any such purpose and it never occurred to plaintiff's counsel to make any such contention until after it was clearly shown by the decision of the Supreme Court of New Mexico that mineral land on this grant was subject to location and entry in 1893, and the final settlement by this Court on appeal from the Court of Private Land Claims of the boundaries of the grant to Lucero, eliminating the land embraced in these and many other mining claims from the grant. We cite the decision to which we refer, as follows:

Lockhart vs. Wills, et al, 9 N. M., 344.
Whitney vs. United States, 167 U. S., 529.
Lockhart vs. Johnson, et al, 181 U. S., 516.

III.

We will now consider the special prayers: First, that the said instrument of writing and conveyance executed by the said Pilkey to his co-defendants be declared fraudulent and void as against plaintiff, and

that it be cancelled and annulled. As we have shown, this imaginary instrument was, as alleged, executed on or about October first, and provided that Pilkey should secretly "transfer, convey and deliver possession of said mine, 'The Sampson,' and sold, transferred and conveyed to the defendants Fagaly, J. A Johnson, Leeds and Walker an undivided four-fifths interest therein." These allegations relate to the "Sampson," not the "Washington," as an inspection of the bill clearly shows. This contract was not recorded. No authority can be found for the cancellation or annulling of such an instrument. Pilkey had a right to convey a one-third interest in the "Sampson"—there was nothing in his contract prohibiting it —a conveyance of any greater interest under the allegations of the bill, while the "Sampson" location was in force, was simply void. It did not constitute a cloud on the title of his co-tenants.

Hartford, &c. Ore Co. vs. Miller, 3 Mor. Min. Rep., 353. 41 Conn., 112.

"The rule applicable to this class of cases is that equity will interpose only when the pretended title which it is alleged constitutes a cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face."

6 Am. & Eng. Enc. of Law (2 Ed.) 153.

In Whitehead vs. Shattuck, 138 U. S., 146, it is said:

"The facts set forth in the bill of the plaintiff clearly shows that he has a plain, adequate and complete

remedy at law for the injuries of which he complains He aleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: That the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If he is the owner in fee of the premises, he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a Court of Equity, either to establish his right to the land or to put him in possession thereof."

Whitehead vs. Shattuck, 138 U. S., 150.

Appellant contended in the Court below that he had a right to this relief under Section 4010 of the Compiled Laws of New Mexico (1897), which authorizes the bringing of a suit to quiet title by one out of possession, as well as by one in possession. We respectfully submit that the Legislature had no power to authorize one out of possession to bring such a suit. Under such a statute, passed by a State this suit could not be maintained.

"It is probable that the only effect of this statute was to enable owners of land not in possession to file a bill for the removal of clouds upon their title; since the ordinary jurisdiction of a Court of Chancery is sufficient toenable owners in possession to file such a bill. The questions, what constitutes such a cloud upon the title, and what character of title the com-

plainant himself must have, in order to authorize a Court of Equity to assume jurisdiction of the case, are to be decided upon principles which have long been established in these Courts. Prominent amongst these are, first, that the title or right of the complainant must be clear; and, secondly, that the pretended title or right which is alleged to be a cloud upon it, must not only be clearly invalid or inequitable, but must be such as may, either at the present or at a future time, embarass the real owner in controverting it. For it is held that, where the complainant himself has no title, or a doubtful title, he cannot have this relief. 'Those only,' said Mr. Justice Grier, 'who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a Court of Equity to give them peace or dissipate a cloud on the title.' Orton vs. Smith, 18 How., 263; and see Ward vs. Chamberlain, 2 Black, 430, 444; West vs. Schnebly, 54 Ill., 523; Huntington vs. Allen, 44 Miss., 654; Stark vs. Starrs, 6 Wall., 402. And as to the defendant's title if its validity is merely doubtful, it is more than a cloud, and he is *entitled to have it tried by an action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to law.* Overing vs. Foote, 43 N. Y., 290; Meloy vs. Dougherty, 16 Wis., 269. Justice Story says: 'Where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the in-

terference of Courts of Equity, to direct it to be cancelled or delivered up, would not seem t oapply; for in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury.' 2 Eq. Jur., Sec. 700a."

Phelps vs. Harris, 101 U. S., 374-5.

To the same effect is Frost vs. Spitley, 121 U. S. 557, where all the decisions of the Supreme Court are quoted and reviewed. Reviewing a case under the Nebraska statute, it says:

"By reason of that statute, a bill in equity to quiet title may be maintained in the Circuit Court of the United States for the District of Nebraska by a person not in possession, if the controversy is one in which a Court of Equity alone can afford the relief prayed for. Holland vs. Challen, 110 U. S., 15, 25. The requisite of the plaintiffs possession is thus dispensed with, but not the other rules which govern the jurisdiction of Courts of Equity over such bills. Under that statute, as under the general jurisdiction in equity, it is 'the title,' that is to say, the legal title, to real estate, that is to be quieted against claims of adverse estates or interests. In State vs. Sioux City & Pacific Railroad, the Supreme Court of Nebraska said: 'Whatever the rule may be as to a party in actual possession, it is clear that a party not

in possession must possess the legal title, in order to maintain the action.' 7 Nebraska, 357, 376. And in Holland vs. Challen, above cited, this Court said: 'Undoubtedly as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises.' "

Frost vs. Spitely, 121 U. S., 557.

The allegation that plaintiff was a co-tenant in the Cochiti grant was wholly immaterial. As already shown by the final decision of this Court, affirming the decree of the Court of Private Land Claims, that part of the Cochiti grant on which the claim in controversy in this case is located was rejected and the land held to be public lands of the United States.

Whitney vs. United States, 167, U. S., 529.

Then, too, in the ejectment suit about this claim, this Court has held land within this grant, while the grant was under investigation before the Court of Private Land Claims and on appeal, to be subject to entry under mining laws of the United States.

Lockhart vs. Johnson, et al, 181 U. S., 516.

Previously this Court had already held that under the Act of 1854, "The Surveyor General's report is no evidence of title or right to the possession."

Pinkerton vs. Ledoux, 129 U. S., 351.

Lockhart vs. Wills, 9 N. M., 344.

Lockhart vs. Johnson, 181 U. S., 516.

Astrozaron vs. Santa Rita Min. Co., 148 U. S., 80.

The last case holds claim of interest in an uncon-

firmed grant cannot be made the basis of a suit to quiet title.

If it is contended that this was a conveyance of an interest in the "Washington," the position is untenable. It is contrary to the allegations of the bill. Pilkey, as the bill alleges, had no interest in the "Washington" standing in his name to convey. The allegation is "by which it was agreed that the said Pilkey in fraud of the rights of your orator in and to the said mine of which he was then in possession as aforesaid, by him discovered and held under said agreement, should transfer, convey and deliver possession of said mine, etc." This is alleged to have been done "on, to-wit October 1st, 1893, the precise date whereof being unknown to your orator." Folio 61. These alegations cannot apply to the "Washington." Under allegations of the bill all that remained to be done to make the "Sampson" location complete was to record the "Sampson" notice of location and ten days of the ninety, within which that could be done under the New Mexico statute, remained. No conveyance by Pilkey of an interest in the "Washington," even if there had been any such interest of record in his name could have operated as a cloud upon plaintiff's title to the "Sampson," for the reason that it did not fall in plaintiff's alleged chain of title to the "Sampson."

Van Wyck vs. Knevals, 106 U. S., 378.
Pixley vs. Huggins, 15 Cal. 128.

6 Am. & Eng. Ency. of Law (2nd Ed.), 166
Notes 5 and 6.

IV.

The Legislature had no power to dispense with possession as a prerequisite to maintain such suits. The constitution of the United States guaranteed the right of trial by jury in such cases, as under the common law, as enforced at the time of the adoption of the constitution, the parties had a right to such trial. We quote further from Whitehead vs. Shattuck, 138 U. S., 151:

"The sixteenth section of the Judiciary Act of 1789, 1 Stat., 82, C. 20, declared 'that suits in equity shall not be sustained in either of the Courts of the United States, in any case where plain, adequate and complete remedy may be had at law,' and this provision has been carried into the Revised Statutes, in section 723. The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England. The term 'speedy' as used in the demurrer is embraced in the term 'complete' in the statute.

"The Seventh amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' That provision would be defeated if an ac-

tion at law could be tried by a Court of Equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. Lewis vs. Cocks, 23 Wall., 466, 470; Killian vs. Ebbinghaus, 110 U. S., 568, 573; Buzard vs. Houston, 119 U. S., 347, 351. And so it has been held by this Court 'that whenever a Court of Law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain adequate and complete remedy, without the aid of a Court of Equity, the plaintiff must proceed at law because the defendant has a constitutional right to a trial by jury.' Hipp vs. Babin, 19 How., 271, 278.

"It would be difficult and perhaps impossible to state any general rule which would determine in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

Whitehead vs. Shattuck, 138 U. S., 150-151.

"The case then goes on to review the case of Holland vs. Challen, 110 U. S., 15, and other cases, and shows that the Court only held that under the statutes dispensing with possession in the plaintiff, the Court could take jurisdiction where neither party is in possession. It quotes from Holland vs. Challender, 'should suit be brought in the Federal Court under the Nebraska statute, against a party in possession there would be force in the objection that a legal controversy was withdrawn from a Court of Law, but that is not this case, nor is it of such cases we are speaking.' It is thus seen that the very case that is no wbefore us is excepted from the operation of the ruling in Holland vs. Challen, or at least was designedly left open for consideration whenever similar relief was sought, where the defendant was in possession of the property."

Whitehead vs. Shattuck, 138 U. S., 156.

The constitution is absolutely binding upon the Territories by statute. We respectfully submit that Ely vs. N. M. & A. R. R. Co., 129 U. S., 291, is not in conflict with this contention. If it was it was an earlier case than Whitehead vs. Shatuck.

V.

The authorities we have quoted under the last two headings fully dispose of the special prayers in the bill that the 'Washington" location be declared void

and that plaintiff be declared the equitable owner of the ore and mineral in said lode.

The prayer that the defendants be enjoined from working the lode, and the plaintiff be declared the equitable owner, is nothing but a prayer to eject defendants and give the claim to the plaintiff.

"To give a Court of Equity jurisdiction, the nature of the relief asked must be equitable, even when the siut is based on an equitable title. The plaintiff does not allege that the defendants, who are in possession of the premises, have the legal title, or that they obtained possession under any person who had it. Nor does she state any facts which connect them with her equity. They being mere naked trespassers, in possession, she prays that they may be turned out of, and she, who has only an equitable title, may be put in possession. The relief prayed for is such as a Court of Law is competent to grant, if the plaintiff's title would justify it. But the plaintiff does not seek by her bill to better her title. If all the relief asked for were granted, she would still have an equitable title only. The case is, therefore, an ejectment bill brought on an equitable title. In these respects it is similar to the bill in the case of Galt vs. Galloway, 4 Pet., 332." * * * *

"This decision is in point, and shows the bill to be without equity as to those of the defendants who are in possession. Their possession is good against all the world except the true owner. As the bill asserts no equity against them, they have the right to stand on

their possession until compelled to yield to the true title, and to demand a trial by jury of the question whether the plaintiff has the true title. The plaintiff cannot deprive them of the right by neglecting to acquire the legal title, and upon the ground of her equitable title ask the aid of a Court of Equity. She can turn the defendants out of possession only upon the strength of the legal title, which she must first acquire Having done this, a Court of Law is the proper forum in which to bring her suit. Hipp vs. Babin, 19 How. 271; Parker vs. Winnipiseogee Manufacturing Co., 2 Black, 545; Grand Chute vs. Winegar, 15 Wall., 373; Lewis vs. Cocks, 23 Wall., 466; Killian vs. Ebbinghaus, 110 U. S., 568."

Fussell vs. Gregg, 113 U. S., 554-555.

See also the cases last cited above.

Hipp vs. Babin, 19 How., 271.

Parker vs. Man'f'g Co., 2 Black, 545.

Grand Chute vs. Winegar, 15 Wall., 373.

Lewis vs. Cocks, 23 Wall., 466.

Killian vs. Ebbinghaus, 110 U. S., 568.

VI.

Prior possession by Pilkey, and surrender of that possession, as alleged in the bill, would, if proven, make a case for recovery in a suit at law. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from mere trespassers who entered without any title.

Christy vs. Scott, 14 How., 180.

"This principle is so well settled, in the law of ejectment and quare clausem fregit, as to need no citation of authorities. It will be found laid down by Mr. Greenleaf in 2 Green. Ev., Sec. 311, that either actual possession of the premises, or receipt of rent is prima facie evidence of title in fee. See also Secs. 618, 618 (a)."

Burt vs. Punjaub, 99 U. S., 180.

In the same volume the Court repeats the statement just quoted, and adds:

"If this be the law, when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession, under the Acts of Congress which respect such possession among miners."

Campbell vs. Rankin, 99 U. S., 262.

VII.

Pilkey and plaintiff, under the allegations of the bill were tenants in common, and Pilkey's possession was plaintiff's, until he was ousted. If Pilkey sold his interest in the "Sampson location' to his co-defendats they became co-tenants with the plaintiff, and if they were in possession, that possession was plaintiff's, too until they openly repudiated it, and commenced to hold adversely. This is also true as to Pilkey. Upon proof of the Sampson location, and the sale of an interest in it by Pilkey, and the entrance of the defendants into possession and the exclusion of the plaintiffs, a *prima facie* case would have been made out in favor of the

plaintiff. This Court, in such a case, says:

"Claiming, as both parties did, under Payne and Cook, the regularity of the location of the mining claims are not in question, and when in 1862 the plaintiff purchased from one of the owners of the claim an undivided interest therein, and went into possession with his grantors and with others deriving title from the original locators * * * * he became a tenant in common with those who were then the owners. He was such when the Union Gold and Silver Mining Company purchased the interest of other owners. By that purchase, that Company succeeded to a tenancy in common with him and so did the defendant, when it became the purchaser. * * The possession of his co-tenants was his possession. They held it for him until he was ousted. That this is a settled rule of law is not denied."

Mining Co. vs. Taylor, 100 U. S., 40.

It is immaterial that Pilkey conveyed more interest than he had. The deed was effectual to convey his third. The same principles are laid down in Freeman on Cotenancy and Partition, Sections 166 and 167.

"The action of ejectment is an appropriate remedy whenever either of the co-tenants has been ousted by the other from the lands of the cotenancy, or any part thereof."

Freeman on Contem. and Part., Sec. 290.

There is no act done by Pilkey upon which to predicate plaintiff's right, alleged in the bill, except the surrender of the possession to his co-defendants, and, as

we have shown, it does not appear whether this was done before October 10th or afterwards. It matters not when it was done, if it was a surrender of possession by Pilkey' plaintiff's possession was good up to that time. If before, then the defendants intruded upon plaintiff's property and held it adversely, plaintiff was excused from completing the location as against the defendants, in a suit at law as well as in equity. Such intrusion, whether with the consent of Pilkey or without it, was wrongful. In such a case this Court has said in a suit at law:

"They would not be deprived of the inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers."

Erhardt vs. Boaro, 113 U. S., 534.

"A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator but all the world, because the law allows no such thing to be done."

Belk vs. Meagher, 104 U. S., 284.

"The record shows actual possession in the appellees which is prima facie evidence of title, and as we said in Lebanon M. Co. vs. Con. Rep. M. Co., 6 Colo., 380, 'entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amounts only to

a trespass, and cannot form the basis for the acquisition of a title.' "

Weise vs. Barker, 7 Colo., 178; 2 Pac., 921
Morton vs. Solambo, 26 Cal., 597.

VIII.

If defendants did not enter into possession until after the 10th of October, and Pilkey was still in actual possession, the entry was nevertheless tortious, and the foregoing authorities would apply. If a peceable entry was made, on the ground of its being unoccupied vacant ground, by reason of the fact that the location made by Pilkey on July 10th had not been perfected by filing the location notice, then the ground was subject to location, and the Washington location was valid. This would be true, for whatever reason the failure to file the Sampson notice may be attributable. It is upon this assumption that the appellant no wclaims that the defendants should be held as constructive trustees. We have already shown, we think, that the bill will not justify such relief. We will, however, proceed to discuss the law applicable to such conditions. The "Sampson" location must for that purpose be considered at an end. There is no relation of confidence between Pilkey's co-defendants and plaintiff. It is only Pilkey's alleged interest in the Washington that can be reached under the contract between him, Johnson and the plaintiff. The bill, we have shown, is not framed for that purpose, and we submit that the plaintiff does not show himself entitled to this relief.

IX.

A Court of Equity will not specifically enforce this contract, as it lacks mutuality. Pilkey could not have enforced it against the plaintiff and Johnson; Pilkey could have abandoned this contract whenever he saw fit, unless actually performed by the plaintiff. There is no allegation that the plaintiff and Johnson ever expended a cent, or did anything under this contract with reference to the "Sampson" location, except to file the location notice on December 9th, and as to this, there is no allegation in the bill that plaintiff did not know that the location notice had not been filed prior to October 10th, and accounting for why he did not file it sooner. The bill alleges: "After the removal by said defendants of the said location notice, posted as aforesaid by said Pilkey, of the 'Sampson' mine, a copy thereof was procured by your orator * * * and the same was recorded," etc., (Transcript, folio 66). It will be observed that the sum of thirty dollars, and a few articles not worth ten dollars, was all that Pilkey was to receive under this contract. The articles he was to receive, at once, and "the thirty dollars, less any montys or provisions or other articles except as above enumerated," he was to receive when he should (have) sunk or driven *a shaft or tunnel four feet by six in a vein of mineral bearing quartz to a depth of twenty feet from the lowest level of the surface at its mouth, such vein and locality to be designated by said second parties.*" This expenditure is all to be made on one vein, in one shaft or tunnel, the vein to be designated

by plaintiff and Johnson. The bill alleges that all that was to be done by them was done "then and there," when the contract was signed. Did they designate the "Sampson" as such vein? The bill noes not say so Was this expenditure made on that ground? The bill does not say so. If it was all expended on one claim, where is the consideration for the performance by Pilkey of the contract for the rest of the year it had to run? It was to run a year, but that was at the option of plaintiff and Johnson. "It shall be at the option of the said second parties to continue working, or abandon any claim located at any time they deem proper." Did they exercise that option as to the "Sampson?" What did Pilkey get if they chose to abandon every claim he discovered? How could he compel them to comply with this contract? In fact what were they to do after furnishing the thirty dollars and these articles? Nothing. Equity will not specifically enforce any such contract, or declare any trust arising out of it, when the bill does not allege that a single cent of the expenditure was made on the ground in controversy.

A mining contract somewhat similar was passed on in Geiger vs. Green, 4 Gill., 472; 13 Morrison's Min. Rep.; where it is said:

"A contract so unequal in its stipulations and bearing, which binds one party, while it leaves the other unfettered, as it respects the observance of its terms, in which there are to be seen no mutual or reciprocal engagements, and which must be regarded, therefore, as unreasonable and inequitable, can never be enforced

by a Court of Equity."

Geiger vs. Green, 4 Gill., 472; 13 Mor. Min. Rep., 329; quoting, Seymour vs. Delancy, 6 Johns. Ch., 224.

Radcliff vs. Worrington, 12 Vesy., 331.

German vs. Machin, 6 Paige, 292.

Boucher vs. Vanbuskirk, 2 A. K. Marshal, 346.

Moore vs. FitzRandolph, 6 Leigh., 185, also quoting from Lord Redesdale.

"I have no conception that a Court of Equity ought to decree a specific performance in a case, except where both parties had, by the agreement, a right to compel a specific performance, according to the advantage which they might be supposed to have derived from it; because, otherwise, it would follow that the Court would decree a specific performance where the party called upon to perform might be in this situation, that if the agreement was disadvantageous to him, he would be liable to the performance, and yet if advantageous to him, he could not compel a performance." 'This,' he says, 'is not equity.'"

13 Mor. Min'g Rep., 328-9; 4 Gill., 472 (Md.)

In a Michigan case Judges Cooley and Campbell decide that if no basis appears upon which one who has taken a mining lease can charge others with its obligations, the latter cannot charge him with having taken it in the common interest, and claim rights under it.

Pierce vs. Pierce, 55 Mich., 675; 13 Mor

Min. Rep., 675.

See also Ducie vs. Ford, 138 U. S., 588, especially applicable to the uncertainty of the allegations in the bill.

Nothing can be more in point. The relief, whatever it may be called, so far as Pelkey is concerned, is the specific enforcement of the contract, and depends upon the enforcement of the contract to prospect for plaintiff and Johnson for a year, and that he, Pilkey, should forfeit any interest by reason of concealment of a discovery or failure to locate, which he might acquire directly or indirectly. This must relate to Pilkey's alleged interest in the Washington. Plaintiff and Johnson, under this contract, have the option to assume obligations and rights under the locations or abandon them. There is no mutuality about this.

We again call attention to the fact that the bill contains neither allegations nor prayer upon which any constructive trust, based on the rights asserted by plaintiff under the contract even as against Pilkey's alleged interest in the "Washington," can be predicated.

X.

The contract Pilkey had a right to abandon, and there would be no remedy in equity on it, as already shown, for specific performance. Plaintiff's rights in the Washington location, if he had any, must arise out of the contract. In Johnson vs. Robinsan, 16 Fed. Rep., 903, will be found a decision very instructive on this proposition. We quote the syllabus:

"The partnership relation or association between parties who may be engaged in prosecuting exploration on public lands for mines, must exist at the time of the alleged discovery and location, in order to give to the parties associated an interest in the property. If it does not then exist, so that the person acting in the field, making the discovery and location, can be said to be acting for the others as well as for himself, no interest can be acquired by those who are not personally present.

"Where several persons associate themselves together, by agreement, to go out and discover mines, and some of them furnish the means of prosecuting the enterprise, as provisions and tools and the like, and others go out and contribute their labor, and each party performs his part of the agreement according to its terms, the contract and declaration of the parties show that hey are acting in fulfillment of thetir contract; but when this contract is apparently abandoned, and some new arrangement is made between new parties, and means are furnished by some of them, as arranged in the first instance, and others go out in the prosecution of the joint enterprise, it would be plain that they were acting under and in pursuance of the last agreement, and not the first, and the parties to the first agreement would acquire no interest in the mines discovered."

Johnstone vs. Robinson, et als., 16 Fed. Rep., 903.

This is this case exactly. If Pilkey abandoned the location and permitted others to locate the ground,

whether he took an interest with them or not, the plaintiff acquired no interest, and as this case holds, his remedy is for breach of contract, if any, at law.

"If one who is clearly an agent of another to purchase property, repudiated the agency and acted for himself, using his own funds, he can not be declared a trustee for principal. *Burden v. Sheridan*, 36 Iowa, 125. A different rule seems to be laid down in Story's Equity Jur. Sec. 1211A, but its limitations will be found in another section of the same volume. Sec. 1201A."

First Nat. Bank vs. Bissell, et al., 4 Fed. Rep., 698.

This case also holds that,

"An agreement between two or more persons to negotiate for the purchase of specific property, does not vest any right in either unless such agreement is consummated by a purchase of the property."

Syllabus, 4 Fed. Rep., 699.

This case was affirmed by this court under the title of Bissell v. Penn, et al., 114 U. S., 250, where the difference between *ordinary* partners, contractors and mining partners is explained.

A mere consignment does not establish a partnership so as to establish a relation of trust and confidence.

Tuck vs. Downing, 76 Ill., 71; 7 Mor. Min. Rep., 83.

We admit that while this contract calls the parties partners, still they were nothing but contractors after any lessee was made to their names, as to that loca-

tion, and we further submit that there was no concealment of a discovery, and no allegation of "any failure to locate" "for the purpose of evading the terms of this agreement and defrauding the said second parties," as provided by the contract, alleged in the bill, with such certainty as to entitle the plaintiff to any relief he is seeking.

X.

It is not true that the location of the Washington was the acquirement of an outstanding title as to the Sampson. The Sampson locaion was at an end, or no valid location of the Washington could be made. The authorities relied upon by appellant in the Court below in his briefs do not sustain his proposition. We will consider them, leaving Lindley on Mines and Turner vs. Sawyer, 150 U. S. 578, for separate discussion

Largey v. Bartlett, 44 Pac. 962 (Montana) is a clear case of agency and notheing more. Geo. F. Bartlett agreed upon performance of certain conditions on the part of Largey, to deed to him an undivided half interest in and to the claims in controversy. Largey alleged full performance. J. H. Bartlett, the second defendant, was employed by his brother, George, and Largey, the plaintiff, in making a survey of the claims preparatory to making application for patent, and while so employed posted an amended notice of location in the name of George, and afterwards, between the time of posting and recording, returned and changed the name, inserting that of his wife, and the notice

was so recorded. The Court places its descision squarely up on the ground that there was a subsisting relation of principal and agent existing, and that all the defendants were parties to the fraud perpetrated upon Largey. This is a proposition we have never disputed.

In Lockhart v. Rollins, 2 Idaho, 503, 21 Pac. 413. the Court finds as a fact, that the defendant was an agent for the principal, who was in a distant state, and as such, in possession of the mine, and that while so in possession he could not make a relocation in his own name for failure to do the annual labor, which he himself had agreed to do.

Utah M. Co. v. Deckert, 6 Utah, 183; 21 Pac. 1002, was an action of ejectment. The findings of the court were that for five years the annual work was done on the claim by one Deckert, as stockholder and agent of the plaintiff, who received pay therefor, and refused to act further for plaintiff and took hostile possession of the claim, and for three years did the work in his own behalf, and afterwards quit-claimed to defendant company. Subsequently in 188[illegible], a new location was made for the benefit of the defen[illegible]nt. It appears from the opinion that Deckert was also a director in plaintiff, and as such made the location in the first instance for plaintiff, and had charge of its affairs in Utah, the headquarters of the Company being in Cleveland. The Court decides that Deckert entered into adverse possession wrongfully, against his principal, and that while such wrongful possession was held, plaintiff was excused from doing the annual work. This case is

authority for the defendants that the remedy is at law We do not see how it helps appellant's case any.

The other authorities simply amount to general propositions of law, as to trust relations, as to which we do not dissent, but which we think are inapplicable here. We will not stop to review them.

XIII.

It is not true, as already stated, that a cotenant in a mining claim cannot relocate the claim, if subject to relocation for failure to do the annual labor, nor is it true, that he cannot locate the ground where the original location has never been completed, either in his own name, or in that of a third person. The ground is not subject to relocation until the old location is at an end. Whenever that ends, the relation of cotenancy has also ended. The moment that the ground becomes subject to location by reason of the failure of the parties to complete the location, the relation of cotenancy as to that ground has also ceased. The outstanding title which the defendant is attempting to get, must be the title of the United States. We have already shown, by the cases of First National Bank vs. Bissell, 4 Fed. Rep., 694, and Bissell vs. Foss, 114 U. S., 252, that a cotenant, a partner in a mining venture can buy an interest in the claim, and it does not inure to the benefit of copartners. The title of the United States is neither a hostile title nor an encumbrance on a mining claim nor a paramount title on a claim which has ceased to exist. The law expressly ends the prior claim and loca-

tion for such a failure. It is as if it never had been. The statute says:

"And upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made."

Revised Stat. U. S. Sec., 2324.

Lindley on Mines, Sec. 406, is quoted for this proposition. He says:

"If we are right in the conclusion reached in the preceding section, that the original locator cannot treat his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow that one of several locators seeking to obtain entire title by reason of the failure of any of them to fulfill the requirement of the law, is likewise prohibited from making such location."

The premises which he lays down, that "the original locator can not treat his failure to perform or resume work as the basis of a valid relocation" is not sustained either by reason or authority.

Wornock vs. Dewit, 11 Utah, 40 Pac., 205, is a well considered case, directly against the contention.

Saunders v. Mackay, 5 Mon., 523; 6 Pac., 361, is also directly opposed to the proposition.

The author then quotes Turner vs. Sawyer, 150 U. S. 578-586. It does not sustain the author. The case decides that the right to advertise a co-owner out, as it is called, is limited to a co-owner who has performed the labor. Turner had purchased the interest of a co-

owner at sheriff's sale to enforce a lien, and the Court held that his was an incumbrance and that the purchase inured to the benefit of a cotenant. A very different proposition. The claim had not ceased to exist. The contention of Lindley completely nullifies the provision that the ground "shall be open to location in the same manner, as if no location of the same had ever been made."

"Here Congress has said in unmistakable language that what has once been located under the law shall not be relocated until the first location has expired."

Belk vs. Meagher, 104, U. S., 285.

And has said in equally unmistakable language, that when the previous location has expired, the ground shall be open to location in the same manner as if no location of the same had ever been made. It would seem to inevitably follow, as held in the following cases, that a cotenant in the previous location can relocate and leave out his cotenants. If so, it is immaterial whether in his own name or the name of another.

Strong vs. Ryan, 46 Cal., 33; 1 Mor. Min Rep., 48.

Dougherty vs. Morris, 16 Pac., 911 (Colo.) 11 Colo., 12.

Saunders vs. Mackey, 6 Pac., 361 (Mon.) 5 Mon., 523.

Hunt vs. Patchin, 35 Fed. Rep. 816.

The fact that in the last case the Court held that the new location was made under such circumstances as to make the relocator a trustee, does not detract from

its force. These circumstances are entirely independent of, and in addition to the previous relation of cotenancy under the prior location. See also

Page vs. Summers, 70 Cal., 121; 12 Pac. 120.

Nor is the argument sound that because a resumption of work may reinstate the rights of the former locators, therefore, the relation of cotenancy continues It ends when the location ends. The location must end before a new one can be made. The relation is also reinstated if the location is reinstated, not otherwise This, however, is not the question here at all, and we have gone into it, because appellant insisted on it in the Court below, and we presume will do so in this Court There was no failure to do work. The location never was completed. The failure to record the location notice left it open for location. Therefore, no trust relationship arises from the making of the Washington location, whether made in Pilkey's name or not, and all collusion and conspiracy charged in the bill, whether true or not, is wholly immaterial. The trust must turn upon the specific performance of the written contract if at all, and we think we have fully demonstrated that no case is made out for such relief.

XIII.

Appellant says that the failure to record the location notice did not work a forfeiture of any rights which may have been acquired by posting the notice on the claim, and doing the other acts of ownership. This

Court, in litigation between the same parties, has decided that by this failure the plaintiff lost any rights he previously had.

Lockhart vs. Willis, 54 Pacific, 336., 9 N. M. 344.
Lockhart vs. Johnson, 181 U. S. 516.

This is res judicata as to this case, and we might leave the proposition where it is, but prefer to review the authorities to some extent. Appellant quotes Lindley on Mines, Sec. 219. This section is against him. So with section 330, where it is said: "But unless completed, the attempted location is of no avail against intervening rights." Section 390 is to the same effect Section 274 seems to be the one principally relied upon. We submit that it, and the authorities cited do not sustain the proposition. This is an act of location. These are conditions precedent, annual labor is a condition subsequent. There is no appropriation, no location until the notice is recorded, and whenever required by the local law, a failure to record renders all else that may have been done nugatory, if a new location is made.

Lindley on Mines, Secs. 330, 273, 390.
King vs. Edwards, 1 Mon., 236; 4 Mor, Min. Rep., 480.

In discussing the local laws requiring work to complete a location, the Supreme Court of Nevada says:

"Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for non-compliance or not, and the mining

claim becomes subject to location by any qualified locator."

Sissons vs. Sommers, 55 Pac. Rep., 829,

Citing,

Ehrhart sv. Boaro, 113 U. S., 527.
Mallett vs. Min. Co., 1 Nev., 188.
Barringer & Adams, Mines 300.
Hamilton vs. Hudson, 53 Pac., 101.

XIV.

We agree with appellant that if the "Sampson" location was recorded before and bona fide right had intervened, it related back and made the Sampson location valid. Wheave contended for this under the allegations, in the bill, all the time, and that for that reason the remedy was at law and not equity. The only fact which could have rendered the Washington location invalid, would have been a tortious entry on plaintiff's possession, actual or constructive, for the purpose of making the location.

XV.

We respectfully submit that a reading of the decision of the Court in Lockhart vs. Wilis, 54 Pacific, 336; 9 N. M.,344, and the application of what is there said as to the evidence in that case, to the pleading on this case will conclusively show that plaintiff has not stated a case entitling him to relief.

XVI.

We call the Court's attention expressly to the 4th

6th and 7th grounds of demurrer, and insist that the decision of the Court below should be affirmed; we will not repeat them here. (See transcript, folio 90.)

In some of the authorities already cited, the rule is laid down that the Court will scrutinize a bill much more closely on demurrer than on final hearing, to determine whether it alleges a case with sufficient clearness and certainty, to command relief in equity. If there is a plain failure to state a case not remediable at law it would be the duty of the Court to dismiss the bill at any stage of the cause. We do not dee mit necessary to quote authorities for this.

We submit that the decree of the Court below should be affirmed.

W. B. CHILDERS,

Solicitor for J. A. Johnson, Julia A. Johnson, Charles Pilkey, Charles Bonsall, Receiver, and for himself in his own person.

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Office Supreme Court U.S.
FILED
OCT 13 1904
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States

October Term, 1904.

HENRY LOCKHART, Appellant
vs.
H. C. LEEDS, et als. } No. 10.

HENRY LOCKHART, Appellant
vs.
H. C. LEEDS, et als. } No. 289.

Brief of Appellees on Motion to Pass No. 10,

Under Rule 26, and to Advance No. 289, that they may be heard as one case.

W. B. CHILDERS,
Attorney for Appellees.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

[illegible], APPELLANT,
vs.
H. C. LEWIS, ET AL. } No. 10.

[illegible], APPELLANT,
vs.
H. C. LEWIS, ET AL. } No. 200.

Brief of Appellees on Motion to Place No. 10 under Rule 16, and to Advance No. 200, that they may be Heard as One Case.

Appellees feel compelled to object to the entertaining of the motion made by appellants in this case, because—

First. That the same questions are not involved in the two cases.

Second. That the Attorney for the appellee is present, and the briefs are on file ready to argue the case No. 10, and that it would require him to return from New Mexico

to Washington for the purpose of arguing these cases if the motion is entertained.

As to the first proposition, the cases are not the same. Attorney for appellees makes the following

STATEMENT.

The litigation in both cases does relate to the same mining property, but the questions involved in the two cases are entirely different.

It is true that at the October term 1900, the ejectment case of *Lockhart* vs. *Johnson* (181 U. S., 516) was submitted and decided by this court. It is also true that in the decision of that case the Court said.

> "Although the plaintiff has no right to maintain "this action yet he ought not to be embarrassed by "a judgment here from pursuing any other remedy "against the defendants or either of them, that he "may be advised; and in order to avoid any com- "plications of that nature, which probably might "result from an absolute affirmance of the judgment "of the supreme court of the Territory, we modify "the terms of that judgment by providing that it is "entered without prejudice to the enforcement by "other remedies, or the rights, if any, which the "plaintiff may have against the parties defendant, "or either of them, and as so modified, such judg- "ment is affirmed."

Case No. 10 had been pending in the District Court of the Territory of New Mexico long prior to the decision

in the ejectment suit. In fact, the action was brought in case No. 10 before the ejectment suit was ever brought. Appellants delayed appealing this case to the Supreme Court of the Territory as long as they could. On the 24th of August, 1900, the decree of the District Court in No. 10 was affirmed. Appellants then delayed taking an appeal until August 2, 1902, in No. 10, when only twenty-two days were left of the two years in which such an appeal could be taken. After the decision in the ejectment case, suit No. 289 was brought.

The bill in case No. 10 was framed upon the theory that a mining claim could not be entered under the mining laws of the United States on an unconfirmed land grant, which was *sub judice*, and prayed for the cancellation of the location under which the appellees in this case claimed, and for possession of the property. The Court below decided in that case that under the allegation of the complaint, the complainants were not entitled to cancellation of the "Washington," defendant's location, and that the facts alleged in the bill would entitle the plaintiff to recovery at law. These are the sole questions involved in this case.

In case No. 289 which was brought in the District Court after the decision in the ejectment case by this court, on the 15th of October, 1901, the complainant stated a cause of action based upon the doctrine of a constructive trust asking the court to hold the defen-

dants as patentees and owners of the Washington Mine constructive trustees. The court below held that these matters could have been set up in case No. 10, and could have been determined in that case, and therefore, the decree in that case was *res judicata* or worked an *est oppel*. It also held that other grounds in the demurrer to the complaint were good. Although not discussed in the opinion of the court below, one of the grounds was the Statute of Limitations of the Territory of New Mexico, which provides that no action or suit for relief on the ground of fraud shall be brought within four years after the discovery of the fraud and not afterwards. This plainly appears upon the fact of the bill in No. 289.

I respectfully submit that the questions involved in the two cases are not the same, although relating to the same property.

Respectfully submitted,

W. B. CHILDERS,

Attorney for Appellees.